Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 01-92
DEVELOPING A UNIFIED INTERCARRIER COMPENSATION REGIME	)	
	)	

COMMENTS OF RNK INC. D/B/A RNK TELECOM

RNK Inc. d/b/a RNK Telecom ("RNK"), by its attorneys, hereby respectfully submits the following comments in response to the Federal Communications Commission's ("Commission") July 25, 2006 Notice seeking comments on the Missoula Intercarrier Compensation Reform Plan ("Missoula Plan" or "Plan").

Respectfully submitted, by the undersigned,

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I. INTRODUCTION

RNK Inc., a small, privately-held company, based in Dedham, Massachusetts, and founded in 1992, has grown from its initial niche of local resale and prepaid long distance calling cards to an Integrated Communications Provider, marketing local and interexchange ("IXC") telecommunications services, as well as Internet Services and IP-enabled services. RNK is a registered Competitive Local Exchange Carrier ("CLEC") in Massachusetts, Rhode Island, New York, New Jersey, New Hampshire, Connecticut, and Florida, and offers wholesale and retail residential and business telecommunications services via resale and its own facilities. In addition, RNK has IXC authority in Vermont, Florida, and Maine, as well as international 214 authority from the Federal Communications Commission ("FCC" or "Commission"). RNK serves a variety of customers via its own facilities, including IP-Enabled telephone customers, with a broad range of telecommunications and non-telecommunications services.

II. SUMMARY

While RNK applauds the attempt of industry groups at intercarrier compensation reform, the Missoula Plan fails to achieve its original goals of establishing a unified intercarrier compensation regime that is economically efficient, preserves universal service, achieves competitive neutrality, is technologically neutral, and/or is compatible with the FCC's legal authority to implement. Among RNK's reasons for requesting that the Commission reject the Missoula Plan are, as follows:

- The Commission lacks jurisdiction to extend the Missoula Plan to intrastate access charges and lacks any authority, either direct or ancillary, to implement the Plan to the extent it would override intrastate access charges.
- The Commission lacks authority to expand the scope of 47 U.S.C. 251(c)(2) by requiring all carriers to interconnect with the additional obligations of incumbent local exchange carriers and /or negotiate interconnection agreements.
- The Commission has no authority to nullify existing interconnection agreements and should ensure that these agreements remain in effect until they are terminated in accordance with the agreement's terms.
- The Missoula Plan's track system is arbitrary and confusing. CLECs seem to be a mere afterthought. The result is a flawed plan tailor-made for monopolies, large, and especially small.
- The Missoula Plans new approach to reducing Access Rates is unnecessary as Interstate switched access reform has already taken place.

- The Missoula Plan's call for Track 1 carriers to reduce interstate access and reciprocal compensation rates in yearly steps is unfair to CLECs that have different rate structures, business plans, customer bases, etc., than ILECs, have reasonably relied upon current reciprocal compensation and access charge regimes, and cannot recoup lost revenue through an increased SLC, or other mechanism.
- The Missoula Plan's attempt to address and modify the well litigated area of ISP-Bound traffic are unnecessary as the Commission, in previous orders and rulings has already promulgated a comprehensive and working system to address ISP-Bound traffic.
- Out of balance traffic has also been sufficiently already addressed by the Commission, and adding another layer to the system will only introduce unnecessary complexity to a system that already works.
- The Missoula Plan's access reform and resulting SLC charge locks-in revenues for incumbents and passes it on to the consumer. The SLC charge allows ILECs to promote anticompetitive behavior, while CLECs are left without the ability to recover the lost access revenue.

- The Missoula Plan's Restructure Mechanism is designed to replace most of the intercarrier revenues lost by carriers; however it focuses on ILECs and merely provides for the possibility of Restructure Mechanism dollars to other carriers sometime in the future. This system is blatantly unfair as it precludes CLECs from taking part in the mechanism.
- The Missoula Plan's significant restructuring proposals completely revamp the current interconnection requirements under the Telecom Act, but have little or no effect in advancing the Commission's goal of simplifying and unifying intercarrier compensation, and are not issues that should be addressed in the same proceeding.
- Implementation of the "Edge" architecture not only adds unnecessary complexity, but will dramatically increase interconnection costs for competitive providers, potentially delaying their expansion into new service territories, while effectively eliminating any chance of competition in territories controlled by rural ILECs.
- The Plan's proposed discriminatory treatment of transport charges not only fails to be uniform, but provides for disparate treatment to the detriment of competition.

- The benefits of the tandem transit "reform" rules flow principally or entirely to those crafting the Plan, RBOCs and rural ILECs, while the CLECs and CMRS providers are left to bear the costs for all tandem transit charges on their originating traffic.
- The Plans attempts to impose new interconnection agreement rules will effectively eliminate duly negotiated, arbitrated, and adopted interconnection agreements and are wholly inequitable
- The Plan's "Edge" proposal places the burden of bearing the costs related to interconnections predominantly on CLECs. Under the Missoula Plan, CLECs will experience a disproportionate increase in interconnection costs, whereby the incumbent's costs will decrease.

The provisions of the Missoula Plan are incomplete and inordinately complex. As a result, should the Commission still consider Intercarrier compensation reform of critical importance, RNK suggests a simpler plan based upon the Commission's own previous and now tried and true methodology to reach the desired result of uniform rates and rules for intercarrier compensation, as well as reformation of the interconnection framework. The following comments describe in detail RNK's position summarized above

III. THE COMMISSION LACKS JURISDICTION TO EXTEND THE MISSOULA PLAN TO INTRASTATE ACCESS CHARGES AND INTERCONNECTIONFRAMEWORK

The Commission lacks jurisdiction to extend the Missoula Plan to intrastate access charges and lacks any authority, either direct or ancillary, to implement the Plan to the extent it would override intrastate access charges. The Commission also lacks authority to expand the scope of 47 U.S.C. 251(c)(2) by requiring all carriers to interconnect with the additional obligations of incumbent local exchange carriers and /or negotiate interconnection agreements.

A. The Commission Lacks Jurisdiction to Extend the Missoula Plan to Intrastate Access Charges

The original goal of the Commission in unifying the various intercarrier compensation regimes was both laudable and attractive. It may, as the Missoula Plan proponents and others contend, benefit consumers, promote competition, and provide legal and economic certainty to a battered industry.[1] However beneficial the Plan may be, that alone does not allow the

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[1] This said, it should be pointed out that the Commission, through the *CALLS Order* (*Access Charge Reform*, *Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long-Distance Users, Federal-State Joint Board on Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962, 13060, ¶ 227 (2000), *aff'd in part, rev'd in part, and remanded in part*, *Texas Office of Public Utility Counsel*, 265 F.3d 313 (5th Cir. 2001)) and the ISP Remand Order (Order on Remand and Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151 (2001), remanded,

Commission to implement it. Rather, the question of whether the Commission has jurisdiction to extend the proposed regulations embodied in the Plan hinges on the following questions: (1) whether or not the access charge "carve-out" under 251(g) applies to interstate *and* intrastate access charges; (2) whether or not the Commission has jurisdiction under section 201(b) and 251(b)(5) alone to abolish the intrastate access charge regime; and (3) whether the Commission otherwise has direct or ancillary jurisdiction sufficient to pre-empt state authority in the area of intercarrier compensation. As discussed below, RNK respectfully submits that the Commission lacks any authority, either direct or ancillary, to implement the Plan to the extent it would override intrastate access charges.

1. Section 251(g) Applies Only to the Interstate Access Charge Regime

In the Plan, its supporters argue that because the Commission, in the *NPRM*, noted that "the section 251(g) carve-out includes intrastate access services," it should exercise its corresponding authority to replace intrastate access charge regimes. This proposition is faulty, because it controverts the "plain meaning" of 251(g).

WorldCom v. FCC, 288 F.3d 429 (D.C. Cir. 2002) decisions of 2001, have already reformed and unified interstate access charges, which for more than two years have been at or close to cost at ILEC rates for all carriers, and reciprocal compensation for ISP traffic, tiering down rates to $.0007 per minute of use, and bill and keep in several states.

Section 251(g) [2], entitled "Continued enforcement of exchange access and interconnection requirements," states:

> [o]n and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996, ***under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission*** after February 8, 1996. During the period beginning on February 8, 1996, and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission. (emphasis added)[3]

By this provision, Congress sought to prevent a possible "interruption" in the access charge regime, established by the AT&T Consent Decree,[4] following divestiture of the Regional Bell Operating Companies.[5] There is no doubt that this is a transitional mechanism, which ends when the traditional access charge rules are "explicitly superseded by regulations prescribed by the

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[2] 47 U.S.C. § 251(g).
[3] *Id.*
[4] *See also* Memorandum Opinion and Order, *In the Matter of MTS & WATS Market Structure*, 97 F.C.C.2d 682, 711-715, ¶ 2 (1983). "On December 22, 1982, we adopted . . . rules for calculating the charges that end users and interexchange carriers would pay a telephone company . . . [with respect to] interstate jurisdiction.
[5] *See Worldcom v. FCC*, 288 F.3d 429, 432-433 (D.C. Cir. 2002) for a more detailed discussion and history of Section 251(g).

Commission"[6] following enactment of section 251(g). Most notably absent, however, is any reference to exchange access services provided under any other basis than "[a] court order, consent decree, or regulation, order, or policy of the Commission,"[7] such as exchange access services provided under state legislative or other authority.

Consequently, the statute can most reasonably be construed to apply *only* to those parts of the access charge regime existing under authority of the Commission—that is, the interstate access charge rules. This conclusion runs counter to the Commission's assertion in the *NPRM*,[8] that "the Commission found that the section 251(g) carve-out includes intrastate access services"[9] in the *First Report and Order.*[10] In fact, the cited reference is taken out of context, and instead, is taken from a portion of a discussion of implementing § 254.[11] Viewed in its entirety, the quote shows that the Commission is merely speculating about Congress's *reasoning* for enacting 251(g) to protect the existing access charge regime, and even there, the

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[6] 47 U.S.C. §251(g).
[7] *Id.*
[8] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, ¶ 79 (2005).
[9] *Id.*
[10] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, First Report and Order, 11 FCC Rcd 15499, 15862-15869, ¶¶. 716-732 (1996) (subsequent history omitted) ("First Report and Order").
[11] *Id.* 11 FCC Rcd at 15869.

Commission uses the provision to support its decision to *allow* temporary application of intrastate, in addition to interstate ILEC access charges to unbundled local switching, not mentioning, of course, any application of the rule upon CLEC access charges, interstate or intrastate.[12] So, given that the Commission was speculating about a reason (and following the spirit of the statute's intent to preserve the existing access charge regime) to allow ILEC interstate and intrastate access charges to apply to unbundled switching, clearly, the Commission was not expressly ruling that it had authority under 251(g) to dictate or preempt intrastate access charges. Part of the reason the Commission was merely speculating instead of making a ruling in that case was also due to the fact (as it had just pointed out) that it already had sufficient authority under section 254 to implement explicit universal service support, and remove universal service support from the access charge regime.[13]

2. The Commission's Direct Authority Under Sections 201 And 251(B) Does Not Require Pre-Emption Of The Intrastate Access Charge Regime.

The Plan supporters argue that "the Commission has direct jurisdiction under sections 201 and 251(b)(5) to prescribe intercarrier compensation rules for the traffic covered under Tracks 1 and 2 of the Plan,

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[12] *See id.*
[13] *See id.* 11 FCC Rcd at 15868.

with the possible exception of originating intrastate access traffic."[14] Looking at the Act, as a whole, this argument fails. Section 251(b)(5) of the Act requires that local exchange carriers have "[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[15] Section 201(b), generally, allows the Commission to prescribe rules and regulations necessary to implement Title II of the Act.[16] However, proper statutory construction precludes this sweeping interpretation of Commission power.

First, it is a well-understood rule of statutory construction that "[s]tatutory text is to be interpreted to give consistent and harmonious effect to each of its provisions."[17] As demonstrated above, the Commission lacks authority to modify the intrastate access charge regime under section 251(g). So, the Commission must read 201(b) and 251(c)(5) in a manner that harmonizes these provisions with the correct interpretation of 251(g) and "to pursue a middle course that vitiates neither provision but implements to the fullest extent possible the directives of each."[18]

Here, such a "middle course" is not only possible, but the Supporters' own arguments provide the solution. In short, 251(b)(5), and the

[14] Plan, Appendix A at p.2.
[15] 47 U.S.C. 251(b)(5).
[16] *See* 47 U.S.C. 201(b).
[17] *Alabama Power Co. v. E.P.A.*, F.3d 450, 455 (D.C. Cir., 1994), citing *Citizens to Save Spencer County v. E.P.A.,* 600 F.2d 844, 870 & n.118 (D.C.Cir.1979).
[18]*Citizens*, 600 F.2d. at 845 (footnote omitted).

Commission's attendant rate-setting and rule-making authority should extend only to jurisdictionally interstate traffic. This approach was endorsed by the D.C. Circuit in *Worldcom*.[19] In reference to the Commission's treatment of jurisdictionally interstate ISP-bound traffic, the court, without deciding the issue, hinted that "there is plainly a non-trivial likelihood that the Commission has authority to elect [a bill and keep] system[,] perhaps under §§ 251(b)(5) and 252(d)(B)(i)."[20] Such rules, based on Supporters' expansive, yet reasonable reading of 251(b)(5), and without running afoul of 251(g), which restricts Commission authority under the Act to federal issues, would vitiate any concerns about conflict between state and federal jurisdictions.

Moreover, this "middle course," based in the premise that the Commission has the power to regulate intercarrier compensation for only jurisdictionally interstate traffic, also has significant practical advantages, that, in the long run, may be just as effective as the timely and complex wholesale replacement of the intrastate access charge system. Plan Supporters argue that the growth of VoIP, wireless and other forms of traffic, predominately interstate in character, will soon "displace traditional wireline traffic."[21] Any intercarrier compensation mechanism adopted, they claim,

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[19] *Worldcom v. FCC,* 288 F.3d at 429.
[20] *Worldcom v. FCC*, 288 F.3d at 434 (parentheses omitted).
[21] Plan, Appendix A at p.6.

"should be built to last."[22] If the anticipated growth in largely interstate traffic occurs as they presume, then intrastate access charge regimes will become largely irrelevant due to the workings of the market, not as the result of heavy-handed federal government intervention, should it even be possible.

3. There Is No Conflict Justifying Pre-Emption Of Traditional State Authority.

a. <u>No direct authority exists for preemption.</u>

Finally, Plan Supporters argue that adopting a compensation plan based on 251(b)(5) would make compliance with any intrastate regimes impossible, thus requiring preemption of the state regulations.[23] They contend that implementation of a unified intercarrier compensation regime is a "critical federal goal" that would be undermined "if the States substantially deviate from the national plan for intrastate access charges."[24] Such a result is required, they claim, under the so-called "impossibility" exception of *Louisiana Public Service Commission v. FCC*.[25]

Even setting aside the showings in I.A and I.B, above, which demonstrate that in fact no conflict is necessary or required to implement the policy of intercarrier reform, this argument, too, is unavailing. First, under *Louisiana PSC*, the court held that "pre-emption of state regulation was upheld where it was not possible to separate the interstate and the intrastate components of the

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[22] *Id.* at 7.
[23] *See id.* at 4.
[24] *Id.* at 5.
[25] 476 U.S. 355 (1986) ("*Louisiana PSC*").

asserted FCC regulation."[26] Otherwise, the court held, section 152(b) of the Act,[27] would prevent the FCC from infringing on traditional intrastate aspects of telecommunications regulation, absent a showing that the state policy "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[28] The Court explicitly limited the application of preemption, stating not in uncertain terms that:

> "an agency literally ***has no power to act***, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it [and that] [a]n agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do." [29]

In applying this limitation to a post-Telecom Act environment, the courts have retained this narrow view of preemption, limiting the power to situations where Congress has expressly. In *AT&T v. Iowa Utilities Board*,[30] the court considered whether the Commission had authority to implement the unbundling provisions of the Act, in terms of *Louisiana PSC's* criteria. There, the Court distinguished the situation in *Louisiana PSC*, holding that the Commission had "explicitly been given rulemaking authority" to implement section 251(c) of the act, unlike the Commission's earlier attempt to preempt Louisiana's depreciation

[26] *Louisiana PSC*, 476 U.S. at 376, n.4.

[27] 47 U.S.C 152(b)(1), in relevant part, states "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier."

[28] *Louisiana PSC*, 476 U.S. at 374.

[29] *Louisiana PSC,* 476 U.S. at 374-5 (emphasis added).

[30] 525 U.S. 366, 381 (1999).

rules.[31] Similarly, the 2nd Circuit, in applying the Supreme Court's rule to a challenge by the New York Public Service Commission to the Commission's 10-digit dialing requirements held that "powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[32]

Here, neither such "manifest purpose" nor an explicit grant of authority exists on which the Commission could base preemption of state authority. To state it another way, "[e]ffectuating a federal policy consistent with the Act is not enough to sustain the FCC's authority to act in intrastate matters."[33]

The Commission's *Vonage Order*,[34] is distinguished from the present matter, inasmuch as preemption relied on the implementation of policies expressly established by statute, namely, section 230 of the Act's declaration that "[i]t is the policy of the United States - to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[35] No such policy statement has been enacted regarding the unification of intercarrier compensation regimes. Although such a policy may be desirable, the only recourse of Plan supporters, is (in the words of the *Louisiana PSC*

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[31] *Id.*

[32] *New York Public Service Comm'n. v. F.C.C,* 267 F.3d 91, 101 (2001), citing *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)

[33] *New York Public Service Comm'n.,* 267 F.3d. at 102 (citations omitted)

[34] Memorandum Opinion and Order, *Vonage Holdings Corporation, Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004) ("*Vonage Order*").

[35] *Vonage Order,*19 FCC Rcd at 22424, *citing* 47 U.S.C. §230(b)(2) (1996).

Court) to press Congress to "rewrite this statute,"[36], and for reasons stated above, namely, that Interstate access rates and ISP reciprocal compensation have already been decreased and unified, and interstate services are and will advance to the point where intrastate services are negligible, no such policy is warranted.

b. The Commission's so-called "ancillary jurisdiction" does not apply to intrastate access <u>charges.</u>

Iowa Utilities Board recognized similar limitations on the Commission's so-called "ancillary jurisdiction."[37] The Commission's "ancillary jurisdiction" is described, in contrast to its "direct" jurisdiction, by the Court's observation that although "'Commission jurisdiction' always follows where the Act 'applies,' [ancillary jurisdiction] exist[s] even where the Act does not 'apply.'"[38] Again, *Iowa Utilities Board* limited ancillary jurisdiction, explaining that "the phrase [in section 152(b) 'or to give the Commission jurisdiction' limits . . . the FCC's ancillary jurisdiction."[39] In other context, similar assertions of ancillary jurisdiction by the Commission) have been dismissed as "extraordinary proposition[s.]"[40] Moreover, an executive agency cannot make a "bare suggestion that it possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that

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[36] 476 U.S. at 376.
[37] 525 U.S. at 380.
[38] *Id.*
[39] *Id.*
[40] *American Library Ass'n v. FCC* 406 F.3d 689, 708. (D.C. Cir. 2005)

area."[41] What is needed by the Commission, and lacking in the current instance is a statutory conferral of authority on the Commission to regulate such matters.[42]

In conclusion, with interstate access and ISP reciprocal compensation already having been reformed via the Commission's orders using far less drastic means than preemption, the lofty goals of intercarrier compensation reform have already, in large part, been met. To tread upon well-settled areas of state authority—especially where, as shown, the Commission lacks authority to supplant state law—is inviting further unnecessary litigation, possibly lasting for years. That could be disastrous for an industry, which given the chaotic regulatory environment before 2001, might not be able to weather a similar period of revenue and cost uncertainty.

A. The Commission Lacks Jurisdiction to Extend the Missoula Plan to Interconnection Framework

The Missoula Plan Interconnection Framework for Non-Access Traffic attempts to expand the scope of 47 U.S.C. 251(c)(2) by requiring all carriers to interconnect with the additional obligations of dominant incumbent local exchange carriers ("ILEC"s). Although 47 U.S.C. 251(a) imposes a general duty of telecommunications carriers to interconnect, the additional

[41] *Railway Labor Executives' Ass'n v. National Mediation Bd.*, 29 F.3d 655 (D.C. Cir. 2004)
[42] *Louisiana P.S.C.*, 476 U.S. at 376.

obligations imposed under 47 U.S.C. 251(c)(2) are limited to the ILECs.[43] The Plan does not attempt to justify why 47 U.S.C. 251(c) should now be expanded to include all telecommunication carriers, but instead, simply misinterprets the scope of the regulation – whether by accident or design. The framers of the Plan correctly state that "… 251(c) requires and ILEC to provide other carriers with interconnection …,"[44] however, the Plan requires all carriers to interconnect with additional obligations pursuant to 47 U.S.C, 251(c)(2). Even if the Plan argued that section 47 U.S.C. 251(a)'s general obligation for all carriers to interconnect would apply, this still would not grant to the Commission the authority necessary to impose the additional interconnection obligations. If Congress had intended that 47 U.S.C. 251(a) enable the FCC to impose specific restrictions other than a general, broad mandate to interconnect, there would have been no need to include 47 U.S.C. 251(c)(2) in the legislation that was clearly meant only for ILECs

The Plan framers also state that the FCC has authority to require all carriers to negotiate interconnection agreements under 47 U.S.C. 252.[45] 47 U.S.C. 252 does set forth the procedures for negotiation, arbitration and

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[43] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd. 15499, 15505 ¶ 1036 (1996) (*Local Competition Order*), *aff.d in part and vacated in part sub nom.*) at 173. "Section 251(c)(2) imposes on **incumbent LECs** [emphasis added] "the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection the local exchange carrier's network'…"

[44] The Missoula Plan: Policy and Legal Overview page 5.

[45] *Id.* at 7.

approval of agreements, however, the actual duty to negotiate and upon whom it can be imposed is found in 47 U.S.C. 251c)(1). Again, 47 U.S.C. 251(c)(1) is an obligation imposed on ILECs, and not on all carriers. Similar arguments as those made above as to why this obligation should now be imposed on all carriers can also be made here in that there is no legal justification. The Plan attempts to rely on 47 U.S.C. 201 and the principals of the Iowa Utilities Board, 525 U.S. at 377-8.[46] Although the Plan does not specify which principals of the Iowa utilities Board it is relying on, it could be inferred that they believe that broadening the scope of 47 U.S.C 251(c) reasonable and necessary for the FCC to implement interconnection framework reform. Since the interconnection agreements and arbitration process currently in place seems to be quite efficient, it does not appear that there is any reasonable or necessary reason for authorizing the Commission to expand the scope of 251c)(1).

The Plan also attempts to nullify existing interconnection agreements that have already been negotiated and are legal binding under existing precedent. The Plan states that carriers are free to reach mutual agreements for the interconnection of their networks, and that absent such agreements, the default rules specified in the Plan will apply.[47] It is unclear, however, as to what effect the Plan will have on existing interconnection agreements, many or most of which would not contain the obligations imposed by the new

[46] *Id.* at 7.
[47] Plan III, Summary.

rules such as requiring connection to the Edge, etc. These existing interconnection agreements were negotiated and entered into in accordance with the regulations in place at the time and should be legally binding for the length of their term. If these existing interconnection agreements contain clauses requiring compliance with new changes of laws and regulations, existing interconnection agreements would need to be adjusted accordingly and if the parties could not mutually agree to terms that were previously negotiated, the new interconnection default rules would take effect. These agreements themselves, as well as the underlying principals and rules have been well-litigated in accordance with the FCC and state commissions. (e.g. Virginia Arbitrations and the Massachusetts Consolidated Arbitrations).[48] In addition, these agreements are binding contracts under state contract law …. Any new requirements for interconnection under Missoula should at the very least preserve the existing agreements and should simply facilitate new ones

[48] *See Consolidated Arbitrations*, D.P.U/D.T.E. 96-73/74, 96-754, 96-80/81, 96-83, 96-84 and Memorandum Order and Opinion In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, CC Docket No. 00-218, Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc, CC Docket No. 00-251.

without imposing strict, unyielding requirements, as the Commission ruled in its similar ISP Reciprocal Compensation Orders.[49]

It is clear from the above that the Commission lacks authority to expand the scope of 47 U.S.C. 251(c)(2) by requiring all carriers to interconnect with the additional obligations of incumbent local exchange carriers and /or negotiate interconnection agreement. The Commission also has no authority to nullify existing interconnection agreements and should ensure that these agreements remain in effect until they are terminated in accordance with the agreement's terms.

IV. INTERCARRIER COMPENSATION ISSUES

The Missoula Plan constructs a confusing Byzantine system of tracks, stages, and threshold reductions that would make any lover of intrigue and Gordian knots salivate. Accordingly, the Plan's framers characterization of the plan as "unifying"[50] intercarrier compensation should not be taken seriously, other than that the Plan "unifies" carriers in a more confusing plan under Federal law, with a continuation of the 50-plus intercarrier compensation schemes in place today on under State law. Despite the

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[49] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier ISP-Bound Traffic,* Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001), *remanded, Worldcom v. FCC,* 288F.3d 429 (D.C. Cir. 2002); *Petition of Core Communication, Inc. for Forbearance Under 47 U.S.C. Sec. 160(c) from Application of the ISP Remand Order,* 19 FCC Rcd 20179 (2004).
[50] Plan at 1.

framers attempts to simplify intercarrier compensation, their "patch" is worse than maintaining the status quo. In addition, the Missoula Plan represents a giant step backward from current intercarrier compensation rules under the Act, other statutes and rulings.

Under the current regulatory structure, competition among carriers is the focus, with specific emphasis on the ability of competitive carriers to compete with monolithic incumbents. The Missoula plan instead places the focus on ILECs and rural ILECs. Rural ILECs are divided into two separate categories, while CLECs are dumped into an "everyone else" category which includes dominant ILECs. The result is a flawed plan that is tailor-made for monopolies, both large, and especially small, and represents the latest blow to the CLEC community. Ultimately, consumers and competitors pay under Missoula while incumbent's revenues are preserved and enhanced. As a result, RNK suggests a much simpler plan to reach the desired result of uniform rates and rules for intercarrier compensation.

A. Arbitrary Track Groupings Ignore Competitive Carriers and Treat CLECs As a Mere After Thought

Many commentators and critics of the current intercarrier compensation regime have noted that it is based on a complex system of interrelated and overlapping orders, rules and decisions. Many of the rules in place today are antiquated or arbitrary, and make distinctions unrelated to technical realities. In response to these problems, in 2001 the Commission launched the Unified Intercarrier Compensation proceeding.[51] The goal of this proceeding is clear: a unified intercarrier compensation regime:

> "Similar types of traffic should be subject to similar rules. Similar types of functions should be subject to similar cost recovery mechanisms. We are interested in not only similar rates for similar functions, but also in a regime that would apply these rates in a uniform manner for all traffic."[52]

The Missoula Plan does little to address the Commission's lofty goals.

The Missoula Plan discriminates against CLECs by including them in the same category as ILECs, while according rural ILECs two separate classes, both of which remain separate from the category of the dominant ILECs.[53] The Commission has long recognized the different community of

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[51] *In the Matter of Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92. FCC 05-33, Further Notice of Proposed Rulemaking (Rel. Mar. 3, 2005).

[52] *Id.* ¶ 33.

[53] *Plan* at 1. The Plan also groups CMRS carriers and IXCs into the same category as the RBOCs. Not surprisingly, the vast majority of the Missoula Plan's supporters are Rural ILECs.

interests between CLECs and ILECS.[54] The plan, although superficially multi-partisan, in reality reflects only the interests of the specific ILECs and rural ILECs involved, certain large ILECs (e.g. Verizon) excepted, and a few token CLECs and CMRS providers with their own unique business plans and agendas.[55]

The Missoula Plan establishes different rules and requirements for three groups of carriers: Track 1 (RBOCs, CMRS, IXCs and CLECs), Track 2 for "most mid-sized rural carriers," and Track 3 for rate of return rural carriers. Track 1 carriers are on the most aggressive track for rate reductions, while Track 2 and 3 carriers, those carriers that usually have the highest inter and intrastate rates,[56] are reduced at a gradual pace.[57] Indeed,

[54] Among the numerous areas of difference, in the context of interconnection, in the Act and the FCC's clarifying orders, ILECs were required to interconnect with CLECs at any "technically feasible point," and at one point, as opposed to ILECs constant and losing battle to implement geographically relevant points of interconnect. In terms of intercarrier compensation, CLECs could use ILEC intercarrier compensation rates as proxies for their own, and were not required to have traffic studies and rate cases to support those rates (See *infra* Section V.A.1). *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd. 15499, 15505 ¶ 1088-89 (1996) (*Local Competition Order*), *aff.d in part and vacated in part sub nom.* Competitive Telecommunications Ass'n v. FCC, 117 F.3d 1068 (8th Cir. 1997), *aff'd in part and vacated in part sub nom.* Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part, and remanded sub nom.* AT&T Corp. v. Iowa Utils. Bd., 119 S.Ct. 721 (1999).

[55] *See Ex Parte* letter to Secretary Dortch (September 15, 2006) Pac-West Telecomm, Inc. (several carriers and organizations dissatisfaction with the Missoula Plan and noting that the Missoula Plan is not the appropriate vehicle for reforming the intercarrier system).

[56] As discussed in Section III *supra*, the Plan gives short shrift and no explanation as to how the Commission will exercise authority to decrease

rural ILECs appear to be the only group of carriers that received any serious analysis as the plan devotes two tracks exclusively to price cap and rate-of-return rural ILECs.

By simply dropping all CLECs into the track 1 bucket, the plan fails to recognize the fact that many CLECs offering service to rural areas are facing issues similar to those faced by rural ILECS.[58] CLECs, in addition to IXCs and CMRS carriers, are lumped in with the RBOCs.

This *ad hoc* Track 1 category is all the more inexcusable when one reviews the different types of carriers comprising it. For example, CMRS carriers are subject to federal oversight and as a result, have "local" calling areas that include entire regions of the country, as compared to CLECs and ILECs whose local calling areas are bound to local communities determined

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intrastate access rates established by state law, and as such, RNK believes the Commission does not have the requisite authority to supersede state law and reduce intrastate access charges.

[57] *See* Plan at section I.B.

[58] *See* Ex Parte of the Rural Independent Competitive Alliance, letter to Secretary Dortch (September 29, 2006) at 2. (noting that some CLECs have achieved high penetration rates necessary to support overbuilding because the incumbent has failed to maintain and update facilities, in essence becoming *de facto* incumbents.). It should also be noted that the Plan introduces rules that will impact network efficiency such as requiring, without explanation, that a "LEC may not exchange local traffic with a CMRS carrier using an IXC." *Plan* at 29. Given that "local" traffic in a CMRS context is intraMTA traffic, which is interLATA and often interstate traffic for a LEC that would normally be handled by an IXC, this recommendation is counter intuitive, compromises innovation and efficiency, and at the very least, begs for a detailed explanation.

by the state commissions.[59] Further, many or most CLECs, certainly those that work in the wholesale "carrier's carrier" market, lack the retail subscriber base enjoyed by the monopoly carriers necessary to allow for certain cost recovery methods, such as a subscriber line charge, to be effective. Given this disparity of interests, one can only surmise that these carriers were simply not important enough to the drafters of the Missoula Plan. The result is that CLECs and CMRS carriers are being treated as RBOCs merely because they may service the same areas as RBOCs. Accordingly, RNK suggests that the FCC take the Plan with a satchel full of salt.

B. Recent Access Charge Reforms Have Reduced Interstate Rates and Limited Arbitrage Opportunities

The Missoula Plan attempts to immediately reduce and unify most terminating intercarrier compensation charges, while unifying and allowing originating charges to persist at higher levels for longer periods of time. Under the Plan, after step 3, Track 1 and 2 carriers will charge a single termination rate for all calls, regardless of jurisdiction or traffic type, if implemented properly.[60] This is unnecessary, however, as interstate

[59] *Local Competition Order at* ¶ 1036. See Also, *T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order CC Docket No. 01-92, FCC 05-42 at ¶ 3 (Rel. February 24, 2005).

[60] For Track 1 carriers, the termination rate will be lowered from $0.0007 to $0.0005 at the beginning of step 4. Plan at Sec. I.B.a).

switched access reform has already taken place, and rates are already uniform, at least within regions. The Commissions "CALLS" order, after a three year tier down, required all carriers to charge rates tied to the in-state/region ILEC's rates, which are at or close to cost in the $.004 to $.005/mou range. This has lead to greater network efficiency and greatly reduced bypass or arbitrage opportunities. Any arbitrage attempts in interstate access areas made in recent years are not due to the rate, but to varying interpretations of the FCC's definition of "telecommunications services" and "information services," which also have been clarified by the Commission[61], with a few more likely on the way soon. As such, the need for a flash-cut to a lower rate has been minimized, allowing the Commission to take a more prudent approach to any reduction of interstate access rates

[61] *Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, Order,19 FCC Rcd 7457 (2004) (Ruling that *AT&T IP-in-the-middle traffic is subject to access charges.*). *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Servs.*, Order, 20 F.C.C.R. 4826, (2005). (Where the Commission found that AT&T's enhanced prepaid calling card service is a "telecommunications service" under the Communications Act of 1934 because it does not "offer" to the card user "anything other than telephone service, nor is the customer provided with the 'capability' to do anything other than make a telephone call."). *See Regulation of Prepaid Calling Card Services,* WC Docket No. 05-68, Declaratory Ruling and Report and Order, FCC 06-79 (June 30, 2006). (Where the Commission affirmed that 8XX calls to "enhanced" prepaid calling cards that provided enhanced services (e.g., horoscopes, sports scores, directory listings, etc…) in conjunction with a telecommunications transmission service do not change the character of the calling card services from "telecommunications services" for purposes of intercarrier compensation).

through the same type of tiered-down method employed by the Commission previously and successfully used to decrease both reciprocal compensation rates for Internet Service Provider dial-up calls, and Interstate access rates for all carriers.[62]

C. Any Reduction of Interstate Access And Reciprocal Compensation Rates Must be Accomplished In A Manner Designed to Prevent Industry Confusion and Instability

The Missoula Plan calls for Track 1 carriers, including CLECs, to reduce rates in yearly steps to a final rate of $0.0005 per MOU by step 4.[63] As noted by the Commission in the *CLEC Access Charge Order,* CLECs have

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[62] Over the past 9 years the Commission proceeded on a broad reform effort in an attempt to make access charges more cost based and to correct the divergences from cost that have implicitly subsidized some users at the expense of others. The Commission has done do in pragmatic steps on the way to eliminating implicit interstate access subsidies. While in the area of reciprocal compensation, the Commission has similarly addressed the problems in a sensible and realistic manner. See *In re Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982 (1997); *In re Access Charge Reform*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000), *In re Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, FCC. No. 01-146 (rel. Apr. 27, 2001)("CLEC Access Charge Order"). See also, I*n the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of* 1996, Declaratory Ruling, CC Docket No., 96-98, FCC No. 99-38 (released February 26, 1999) ("FCC Declaratory Ruling"). *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Dkt. Nos. 96-98 & 99-68, FCC 01-131, (rel. Apr. 27, 2001), *remanded, WorldCom, Inc. V. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

[63] Plan at 4.

different rate structures, business plans, customer based, etc than ILECs,[64] and as with both reciprocal compensation and interstate access charges, CLECs have become accustomed to reciprocal compensation rates between \$.0007 and \$.008/mou., and interstate access rates at current default levels of .004 to .006/mou.[65] As stated above, because of CLECs' customer bases, wholesale business models, and lack of ubiquitous rate-payer-funded networks, many CLECs cannot recoup lost revenue through an increased SLC, or other mechanism. Accordingly, if the Commission wishes to decrease and unify intercarrier compensation rates, as it did with both internet bound reciprocal compensation and interstate access in the last five years, RNK suggests that the Commission tier both non-ISP and Interstate access rates down over a similar period of four years, starting with a rate of .006 or under (or existing rates) for non-ISP reciprocal compensation, including traffic exchanged between CMRS providers and all others (yet in both originating and terminating directions for CMRS providers only), and drop the maximum rate .0015 each year for four years to a final rate of .0005. For interstate

[64] *CLEC Access Charge Order*, at ¶ 18. ("We decline to immediately move CLEC access rates to the rate of the competing ILEC. CLECs have, in the past, set their rates without having to conform to the regulatory standards imposed on ILECs, and this Commission has twice ruled, in essence, that a CLEC's rate is not per se unreasonable merely because it exceeds the ILEC rate. Accordingly, we are reluctant to flash-cut CLEC access rates to the level of the competing ILEC; a more gradual transition is appropriate so that the affected carriers will have the opportunity to adjust their business models.").

[65] As stated in Section X *supra*, RNK does not believe this Commission has the authority to adjust intrastate access rates, however, to the extent the Commission may impose or seek to impose such adjustments to intrastate access rates, RNK would advise a similar tier down over time.

access rates, RNK suggests a similar process, starting at the current rate of .005/mou. and dropping it for both originating and terminating access .0011 each year for four years, down to a rate of .0005 in the fourth year. RNK suggests a similar scheme for rural ILECs that will bring all carriers down to .0005 for all traffic under the jurisdiction of the FCC in the year 2011. In addition, similar to the ISP Order, RNK suggests that the Commission not attempt to affect negotiated traffic exchange agreements to remain until expired in accordance with the terms of those agreements, at which time the carriers would be subject to the reformed intercarrier compensation rates in effect at that time.[66]

Because the tier down approach employed in the *CLEC Access Charge Order* and the *ISP Remand Order* is familiar to the entire industry, and occurs over a similar time period, carriers will be able to make business plans around the changes, and will cut the cost of litigation and billing disputes dramatically.[67] There will, and should be, no special treatment for carriers, other than that rural carriers, much like in the *CLEC Access Charge Order*,

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[66] *See ISP Remand Order* at ¶ 82. ("The interim compensation regime we establish here applies as carriers re-negotiate expired or expiring interconnection agreements. It does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions. This Order does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here."). See also *Id.* at ¶ 77. (The Commission also acknowledging that imposing an interim intercarrier compensation regime for ISP-bound traffic that served "to limit, if not end, the opportunity for regulatory arbitrage, while avoiding a market-disruptive "flash cut" to a pure bill and keep regime" was advisable).

[67] *CLEC Access Charge Order* at ¶ 37.

will start at higher initial rates.[68] To reiterate, RNK feels that a tiered-down system that has worked successfully twice in the same and similar intercarrier compensation schemes in the recent past will work again here, and that there is no material reason to create a more complex plan that will undoubtedly create confusion, industry instability increase litigation and ultimately harm competition.

D. The ISP-bound and Out-of-balance traffic Rules Proposed in The Plan are Discriminatory and Unnecessary Since the Commission has Already Addressed These Issues in Other Proceedings

The Missoula Plan attempts to address and modify the well litigated area of ISP-Bound traffic as if it were still an issue today. The Commission, in various Orders and Rulings has promulgated a comprehensive and working system to address ISP-Bound traffic.[69] In the *Order on Remand*, the Commission determined that, subject to a rebuttable presumption, any traffic in excess of a 3:1 ratio of originating to terminating traffic would be considered ISP-Bound traffic.[70] In that decision, the Commission allowed carriers to rebut the presumption that inbound traffic over the 3-1 ration was ISP-Bound traffic by demonstrating to state PUCs that the traffic

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[68] *Id.* at ¶ 64.

[69] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier ISP-Bound Traffic,* Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001), *remanded, Worldcom v. FCC,* 288F.3d 429 (D.C. Cir. 2002); *Petition of Core Communication, Inc. for Forbearance Under 47 U.S.C. Sec. 160(c) from Application of the ISP Remand Order,* 19 FCC Rcd 20179 (2004).

[70] *ISP Remand Order* at ¶ 79.

terminating to their networks was not ISP-bound traffic, allowing carriers exceeding the ratio in various states, but without ISP-bound traffic not to be penalized.[71] This ruling was a fair and efficient manner of handling the issue, and as such, RNK advocates that the present framework for ISP-Bound traffic remain in place.

Further, RNK does not support the so called "out-of-balance safeguard."[72] Under the Plan, terminating traffic above the 3:1 ratio, for Track 1 to Track 1 traffic, the carrier terminating the larger amount of traffic will have the financial obligation for *all* transport to interconnect the two carriers. For Track 2 or Track 3 carriers terminating transport charges generally will not apply to the out-of-balance traffic originating from Track 1 carriers.

Out of balance traffic is already addressed by the *ISP Remand Order,* and adding another layer to the system will introduce unnecessary complexity to a system that works. In addition, shifting cost as recommended by the out-of-balance provisions of the Plan may introduce new arbitrage opportunities.[73] Under the Plan, a terminating carrier that has non-access traffic in excess of the 3:1 ratio (regardless of the presumption being rebutted or not) will pay 100% of the transport costs between the two carriers

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[71] *Id.*

[72] Plan at Section II.E.9.

[73] Plan at Section II.E.9.b.

"regardless of whether it is ISP-bound traffic."[74] Such a rule may have the unintended effect of providing an arbitrage opportunity for carriers with customers that have large outbound calling patterns (e.g., customer service centers, telemarketers, political advertisements, etc …) allowing the originating carrier to avoid transport costs between it and the terminating carrier. In this scenario the originating carrier may be compensated twice for this traffic, once by the customer via the SLC (and possibly the Restructure Mechanism[75]) and again by the terminating carrier is paying for the transport costs.

Attempting to recast intercarrier compensation is difficult, while attempting to address matters that are "not broken," such as ISP-bound traffic compensation, makes the task unnecessary, and likely to create new problems. ISP-bound intercarrier compensation is already at bill and keep or rates of .0007/mou., so, in the case of ISP-Bound traffic, the old adage holds true: "if it ain't broke, don't fix it."

E. The Subscriber Line Charge Increases Proposed in the Plan Will Subsidies Incumbents While Harming Consumers and Competitors

The Missoula Plan looks backwards by locking-in revenues for incumbents and passing it on to the consumer (See SLC, Restructuring

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[74] Plan at Section II.E.9.a.

[75] *See* Section X *infra*.

Mechanism transiting rates are deregulated before markets are competitive,) essentially creating a revenue neutral approach for incumbents, many of which have already obtained a revenue neutral anti-consumer pass-through of intrastate access charge decreases.[76] The SLC charge allows ILECs to promote anticompetitive behavior by moving the charge from carriers, where there is competition, and imposing it directly upon consumers, where, at least at this point in time, and certainly in large portions of the country, there is little to no local compensation, thereby creating a subsidy.[77] In the meantime, competitive LECs, especially those who have a substantial wholesale component, without the vast numbers of subscribers or retail customers, will be left without the ability to recover the lost access revenue, while certain ILECs are made whole.

The SLC cap increases will be directly felt by residential customers and the increase to the charges will allow carriers to shift revenue recovery from the business customer to the residential customer. The SLC increase simply replaces access dollars lost from the wholesale side of the house with SLC dollars paid by consumers. The benefit to consumers in this regard

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[76] *See generally*, D.T.E. 01-31, Phase II, 2003. (Where the Massachusetts Department of Telecommunications ("DTE.") increased Verizon's dial-tone line rates to off-set access revenue lost by Verizon's decrease of intrastate access to interstate levels. The DTE approved a $2.44 subscriber line increase to retail customers because it was proportionate with reductions to switched access.).

[77] It should also be noted that the SLC is counted as federal revenue and may not be assessable for state USF programs.

seems to be nonexistent, and for many, will simply increase their cost of telephone service.

F. The Restructure Mechanism Will Provide Incumbents With Subsidizing Coffers to Recover Lost Revenue Without Allowing Competitive Carriers The Ability to Draw from It.

The Missoula Plan creates a "Restructure Mechanism…designed to replace most of the intercarrier revenues lost by carriers…"[78] The Restructure Mechanism focuses on ILECs and merely provides that "Restructure Mechanism dollars will be available to other carriers *in circumstances to be determined in the* future"[79] The Restructure Mechanism is based on existing rates and minutes of use (MOUs) and is not reflective of lost customers or lines. Separate from the use of existing MOUs, the Restructure Mechanism fund is further inflated because most carriers, except Track 1 carriers, are made whole even if they lose lines. Track 2 carriers during part of the Plan period and rate of return carriers for the entire Plan period are compensated for lines losses. The RM provides revenue recovery on a per line basis.[80] This mechanism serves close to the same purpose as the federal universal service fund, with one distinct difference; it is *not* open to competitive carriers at present. This system is blatantly unfair because CLECs must reduce access charges on a track similar to ILECs for reductions

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[78] Plan at 63. As a base matter, RNK is dubious that this Commission has the legal authority to create an estimated $1.5 billion fund.
[79] Plan at 74. (*emphasis added*).
[80] For example, if the recovery per line is $10 and the rate of return carrier that had 10 lines prior to the plan, but after the plan has 8 lines, would receive $100 not $80 from the RM fund.

without the benefit of dipping into the Restructure mechanism as ILECs are. Further, this "off-set" ignores the other revenue opportunities that incumbents are developing (e.g., DSL service, bundled local and long distance, Interconnected VoIP and video fiber services) being rolled out by ILECs.[81]

Precluding CLECs from taking part in this mechanism further demonstrates the unfairness of the plan, pushing more funds into the monopoly coffers. Such a device for monopoly preservation is certainly not in the public interest and does not stimulate competition.[82] In the final analysis, this mechanism builds in a subsidy since the ILECs' MOUs are declining, that is unfair and anticompetitive.[83]

G. Conclusion

Because the intercarrier compensation provisions of the Missoula Plan are incomplete and inordinately complex, it is impossible to understand all of its requirements and calculate the precise effects on consumers, providers, and the market. The Plan is liken to the *Frankenstein* monster, composed of many disembodied parts (some laudable and some of dark consequence), but

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[82] Indeed it almost seems as thought the drafters of the Missoula Plan have inadvertently reincarnated a form of rate of return regulation, guarantying compensation for lost access paid for by the rate payers.

[83] *See Trends in Telephone Service Report,* Industry Analysis and Technology Division
Wireline Competition Bureau, Section 10-4, Table 10.2 (Rel. June 12, 2005).

society will never accept its grotesque form. Consequently, the Plan will lead to endless disputes, litigation, new and revitalized arbitrage opportunities, and uncertainty. Arbitrage opportunities can be better addressed in existing FCC proceedings and by permitting states to have a role.

V. PROPOSED CHANGES TO INTERCONNECTION RULES AND FRAMEWORK

Although the primary purpose of this proceeding is to devise a new plan that will both consummate the pro-competitive vision of the Telecommunications Act of 1996 ("Act" or "Telecom Act") and unify intercarrier compensation,[84] the Missoula Plan also includes a significant restructuring of network interconnection architecture. In addition to the fact that major interconnection reform is not a seminal part of the Commission's intercarrier compensation reform docket, significant changes to carrier interconnection rules are premature since the Commission is still assessing exactly how intercarrier compensation should be reformed.

Intercarrier compensation and interconnection are not issues that must be addressed in the same proceeding. In fact, these issues are better addressed separately to permit the Commission to establish a new compensation mechanism and then allowing some time for the system to actually be implemented, ironing out any lingering issues. Once this has

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84 *See In the Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, p. 1-2, CC Docket No. 01-92 (rel. Apr. 27, 2001).

been done, if necessary, the Commission can address any outstanding interconnection issues, although current rules governing interconnection between ILECs and their competitors for the exchange of both access and non-access traffic are well established, as are rules and agreements governing interconnection between LECs and CMRS providers. Inclusion of the significant restructuring proposals that completely revamp the current interconnection requirements under the Telecom Act, yet have little or no impact on the advancement of the Commission's goal of maintaining the pro-competitive vision of the Act and unifying intercarrier compensation, will likely contribute considerably to extending this docket well past its sixth or seventh anniversary.

Also, if the Commission wishes to examine interconnection rules between rural ILECs -- who had significant input into the Plan -- and other carriers,[85] then a specific docket dedicated to those issues may resolve

[85] RNK is aware of Time Warner Cable's struggles to interconnect with rural ILECs, who would not negotiate with them to interconnect indirectly, in South Carolina. The rural ILEC's had similar problems when they tried to force CMRS carriers to negotiate with them for indirect interconnection. *See Petition of Time Warner Cable for Preemption Pursuant to Section 253 of the Communications Act, as Amended*, WC Docket No. 06-54 (filed Mar. 1, 2006); *Application of Time Warner Cable Information Services (South Carolina), LLC, d/b/a Time Warner Cable to Amend its Certificate of Public Convenience and Necessity to Provide Local Voice Services in Service Areas of Certain Incumbent Carriers who Currently Have a Rural Exemption, Petition for Rehearing or Reconsideration of Order No. 20005-412 of Time Warner Cable Information Services (South Carolina), LLC*, Public Service Commission of South Carolina, Docket No. 2004-280-C (2005); *see also T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC*

concerns in that area in a more expedient fashion. Nonetheless, if in this proceeding, the Commission does pursue more widespread changes to the rules governing interconnection set forth in section 251 of the Telecom Act, RNK urges that it consider the following issues.

A. Missoula's Impact on Current Interconnection Rules under the Telecom Act.

1. Elimination of Single Points of Interconnection in a LATA

The Plan permits ILECs to designate multiple interconnection points in a single LATA, each called an "Edge,"[86] thereby eliminating the long-established rule permitting interconnection at "any technically feasible point within the carrier's network,"[87] including the right to request a single point of interconnection in a LATA.[88] This expansion of the number of interconnection locations in each LATA will significantly increase the network cost per LATA for CLEC's. A Track 1 ILEC could require a competing LEC to interconnect at each of its access tandems in a LATA rather than at the CLEC's designated single access tandem POI in that

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Wireless Termination Tariffs, Declaratory Ruling and Report and Order CC Docket No. 01-92, FCC 05-42 at ¶ 3 (Rel. February 24, 2005).

[86] Plan at III.B.1 and 2.

[87] 47 U.S.C. § 251(c)(2).

[88] *See Petition of WorldCom, Inc. pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission regarding Interconnection disputes with Verizon Virginia Inc., and for expedited arbitration*, CC Docket Nos. 00-218, 00-249, 00-251, Memorandum Opinion and Order, 17 FCC Rcd. 27039, 27057-27068 (2002) ("Virginia Arbitration Order").

LATA, as is the case today. Similarly, rural ILECs in Tracks 2 or 3 can require that a CLEC interconnect at every single point considered an Edge, such as an eligible end office, trunking media gateway, POP location that extends this trunking media gateway functionality, or an access tandem.[89] This proposal completely reverses the decade-old interconnection framework set forth in the Telecom Act in effect today and appreciably favors ILECs, and rural ILECs specifically, at the CLECs' expense, permitting ILECs to disregard a CLEC's single POI designation in a LATA and instead designate its own Edge or Edges. This also flies in the face of years of ILEC attempts to implement geographically relevant interconnection points ("GRIPs") or GRIPs-like provisions that dozens of public utility commissions, and the FCC, have rejected on numerous occasions over the past decade. CLECs have reasonably relied on these existing rules and precedent, and have built their networks in accordance with them. Implementation of the "Edge" architecture not only adds unnecessary complexity, but will dramatically increase interconnection costs for competitive providers potentially delaying their expansion into new service territories, while effectively eliminating any chance of competition in territories controlled by rural ILECs. Should the Commission consider such an option, RNK strongly urges the Commission to allow a lengthy period of time to implement such change to provide CLECs sufficient time to adjust their networks, which, among other reasons, are

[89] Plan at III.B.2.e.

often subject to long term contracts with significant early termination fees for key elements.

2. Burden of Transport Charges Shifted to Competitive Providers

Under current interconnection rules,

> the originating carrier. . . is responsible for paying the cost of delivering the call to the network of the co-carrier who will then terminate the call. Under the FCC regulations, the cost of the facilities used to deliver this traffic is the originating carriers' responsibility, because these facilities are part of the originating carriers' network. The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls. This regime represents rules of the road under which all carriers[90] operate, and which make it possible for one company's customer to call any other customer even if that customer is served by another telephone company.[91]

Certain RBOCs, however, have argued that interconnection obligations be changed to make CLECs responsible for both originating traffic, and terminating traffic.[92] The Missoula Plan seeks to disturb the current even-handed treatment of providers in favor of the ILECs' preferred interconnection method, which would result in transport charges being

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[90] In the past few years, however, ILECs have challenged this rule offering a different interpretation which would call for each party to pay for all transport required on their side of the network, between their network and the POI. *See e.g.*, Virginia Arbitration Order at 67 (argument by Verizon). This would relieve ILECs from paying for inbound trunks from the POI to a competitor's network.

[91] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132, ¶ 70 (rel. April 27, 2001) ("Intercarrier Compensation NPRM") (*emphasis added*); *see also* 47 U.S.C. §§ 252(d)(1) & (d)(2) and *In the matter of TSR Wireless v. U.S. West*, FCC 00-194, (rel. June 21, 2000), ¶ 34.

[92] Verizon calls this theory "POVEN" architecture.

assessed in a disparate manner – quite the opposite of the Commission's goal in this proceeding of unifying intercarrier compensation regimes.

Indeed, the Plan proposes a number of special provisions and exceptions and actually increases the number of rules applicable to transport charges. These new rules include: repricing transport at special access rates rather than at cost (as provided for in the Telecom Act; *see* 47 U.S.C. §§ 251(c)(2)(D) and 252 (d)(1)); the "Out of Balance" Transport Rule, which requires CLECs to pay for both the ILEC's and its own share of the interconnection facilities in the event there is an imbalance of ILEC customer originating traffic terminating to CLEC customers – which according to the Plan occurs when there is more than three times the traffic going from the ILEC to the CLEC than from the CLEC to the ILEC;[93] and the Modified and Full Rural Transport rules, the former, generally applicable to Track 3 ILECs, providing that any CLEC that interconnects with a Track 3 rural ILEC must pay (1) "to transport [its] originating traffic to the [rural] ILEC's Edge," (2) "for provisioning the interconnection transport to carry traffic (in both directions) between its Edge and the 'meet point' with the [rural] ILEC," and (3) calling for the rural ILEC to pay "for 50 percent of the capacity required to transport its [originating] traffic from the 'meet point' to the terminating Track 1 carrier's Edge, [and] this obligation extends only to the

[93] Plan at II.E.9.

first ten miles of such transport capacity;"[94] and the latter, applicable to qualifying Track 2 ILECs, which provides that "these Track 2 carriers ultimately will not be required to bear any transport cost between the meet point and the Track 1 carrier's Edge."[95]

To summarize, CLEC's pay transport charges for everyone's customer's traffic that touches the CLEC's network in any direction, Track 3 rural carriers pay ILECs for 10 miles of transport (at a 50 percent discount) for the rural ILECs' customers' originating traffic, and dominant monopoly ILECs do not pay any carrier transport charges for any traffic at any time – hardly the picture of "fairness and balance."

In presenting its goals for this proceeding, the Commission stated that "[w]e are interested in not only similar rates for similar functions, but also in a regime that would apply these rates in a uniform manner for all traffic."[96] The Missoula Plan's rules with regard to interconnection transport charges clearly fail to further the Commission's goals. Instead, these rules hinder competition, offering inequitable treatment that cannot be justified by the mere fact that some carriers terminate more traffic than others. Accordingly, the Plan's proposed discriminatory treatment of transport charges not only

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[94] Plan at II.E.3.e.1, 2 and 4.
[95] *See* Plan at II.E.3.e.i.4 and II.E.3.e.ii.1.
[96] Further Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, ¶ 33 (Mar. 3, 2005).

fails to be uniform, but obviously provides for disparate treatment to the detriment of competition.

3. Increase in Tandem Transit Rate

ILEC tandem transit service allows a LEC to interconnect with another LEC indirectly via a third LEC's tandem and transport facilities, which are usually part of an RBOC's ubiquitous tandem network and the PSTN in general. The ability to indirectly interconnect is critical to CLECs and other carriers, such as CMRS providers and rural ILECs, and tandem transit provides an efficient means by which to implement § 251(a) of the Telecom Act.[97] With the exception of CMRS providers, these providers and others generally have comparatively low traffic volumes with switch locations great distances apart, thus making tandem transit via an RBOC's tandem network vital to connect these carriers' networks and customers. When calls between two providers are routed through an ILEC's tandem switches, a tandem transit rate applies. In the early stages of the Missoula Plan, RBOCs would be permitted to charge $.0025 per MOU,[98] which on its face does not cause great concern, especially if the Commission adopts RNK's recommendation for a slow tier-down of other rates. However, this rate has been touted by Missoula's supporters as being capped under the Plan, which

[97] 47 U.S.C. § 251(a)(1) (providing that "[e]ach telecommunications carrier has the duty. . .to interconnect directly or *indirectly* with the facilities and equipment of other telecommunications carriers . . . .") (*emphasis added*).
[98] Plan at III.D.4.

is misleading, and should not be perceived as a dramatic rate *decrease*, which it is not, as a majority of other rates are under the Plan . Upon closer inspection, under the Plan's proposal for tandem transit "reform," if a carrier exceeds 400,000 MOUs in a month, the RBOC may *double* the .0025 rate and charge up to $.0050 "for all of the Ordering Carrier's Tandem Transit Service MOU between those two switch points."[99] Also, "[b]eginning at Step 4, the capped rate will be lifted for Tandem Transit Service provided entirely within an MSA. . . ."[100] Finally, Step 5 allows the rate cap to *increase* annually in conjunction with inflation.[101] As such, the tandem transit rate is neither decreased, nor capped under Missoula, and instead, will become completely unregulated, potentially leaving smaller carriers with few to no options in exchanging traffic, especially with those carriers having small individual volumes to numerous carriers, which, in aggregate, may be substantial and at a high cost, could jeopardize intercarrier traffic exchange of all traffic.[102]

The rural ILECs, however, seem to be insulated from the new tandem transit rates under the Plan, as it eliminates the rural ILECs' duty to purchase tandem transit for indirect interconnection. Instead, CLECs and

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99 Plan at III.D.5.b.ii.

100 Plan at III.D.4.e. Moreover, according to the Plan the Commission will hold a "Step 4 proceeding" at which it will consider "what competitive triggers should serve to eliminate the rate cap for Tandem Transit Service provided between two different MSAs." *Id.* at III.D.4.e.i.

101 Plan III.D.4.b.ii.

102 It is not inconceivable that a carrier, faced with high transport costs to get originating traffic to other carriers, may not be economically able to offer the service individually, or in the aggregate.

CMRS providers will bear the costs for all tandem transit charges on their originating traffic, with CLECs alone having the additional burden of being required to pay such charges for rural ILEC's customers' originating traffic terminating to the CLEC's customers. Accordingly, as with other parts of this Plan, the benefits of the tandem transit "reform" rules flow principally or entirely to those crafting the Plan, RBOCs and rural ILECs.

B. Other Deficiencies with the Missoula Plan's Changes to Interconnection Rules and Architecture

1. Impact on Interconnection Agreements.

As a result of the Telecom Act, many interconnection agreements have been negotiated and entered into between CLECs and ILECs/RBOCs. As for the fate of these agreements, the Missoula Plan provides a number of options. These options, however, seem inequitable and would significantly alter the terms of the already-negotiated agreements or even worse, outright disregards these agreements, giving them no effect at all. For example, the Plan provides that "[e]ither carrier may choose to replace the exiting interconnection arrangement with the default Access Tandem Edge arrangement provided for by the Plan . . .,"[103] and also establishes default rules applicable when the parties agree to maintain existing POIs.[104] As for one party unilaterally choosing whether or not a negotiated interconnection

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[103] Plan at II.E.3.d.ii.1.
[104] Plan at II.E.3.d.ii.2.

agreement should be maintained, this is inherently unfair and leaves CLECs, who presumably would prefer that their negotiated agreements remain in tact, at a clear disadvantage.[105] The alternative under which the existing POI is maintained also negatively impacts CLECs, as this provision absolves the ILEC of any responsibility to transport its own originating traffic beyond the existing POI (called the "Virtual Edge" under the Plan) to an interconnecting CLEC's network. This leaves the CLEC essentially footing the bill, as it is now must incur the cost of transporting the ILEC's originating traffic as well as its own terminating traffic.[106]

Not only are these alternatives to negotiated interconnection agreements wholly inequitable, but they would also summarily obliterate ten years of time, effort, and resources expended by the parties' to negotiate these agreements, which currently govern their business relationships. Further, the parties' sought and received the FCC's approval for these agreements, and there is ten years of case law devoted to interpreting these complex

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[105] For guidance in this situation, the Commission should look to its Order in its *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* proceeding, in which it decided that the rules resulting from that proceeding would only go into effect after the expiration of any parties' interconnection agreements. Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd 9151, 9189 at ¶ 81 (2001) ("ISP Remand Order").

[106] Plan at II.E.3.d.ii.2.

agreements and the negotiations surrounding them, all of which would become obsolete under the Missoula Plan.[107]

2. The Missoula Plan Should Not Impose Changes to the Current Network Interconnection Rules.

The current interconnection rules have been in place for almost a decade, and for exchange access interconnection, more than twenty years. The Missoula Plan already proposes significant and substantial reforms to intercarrier compensation, but likewise, it seeks to drastically alter the interconnection rules and architecture even though consideration of this subject matter is unnecessary to the creation of intercarrier compensation reform. Whatever issues or disputes exist in the area of network interconnection can and should be addressed and resolved in a separate proceeding. In fact, it would be more logical to evaluate these rules and framework at a later date, when it is clearer just what form the modifications to intercarrier compensation will take. Indeed, if any network

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[107] For example, in one swift action, the Plan gives RBOCs victories in GRIPs, where despite repeated and persistent attempts in all but a few states, over the past decade, RBOCs have not been able to implement GRIPs. *See e.g., MediaOne/Greater Media_Arbitration Order*, D.T.E. 99-42/43, 99-52 (1999); *Investigation by the Department on its own motion as to the propriety of the rates and charges set forth in the following tariffs*: M.D.T.E. Nos. 14 and 17, filed with the Department on August 27, 1999 by New England Telephone Telegraph Company d/b/a Bell Atlantic-Massachusetts. D.T.E. 98-57 (March 24, 2000); and the Virgina Arbitration Order at IV.B.1.a.

interconnection issues should be addressed, it is those regarding next generation networks, rather than TDM, which are unlikely to change quickly for the small carriers who rely on them most, and will and are already changing for the largest carriers.

It is evident from the Plan's "Edge" proposal, described *supra*, that the burden of bearing the costs related to interconnections will rest predominantly with the CLECs. Not only is this completely contrary to the rules established by the Telecom Act, but there is no reasonable justification for this shift, which seems to have occurred due to the fact that CLECs were not significantly involved or represented in the framing of the Plan. Over the past decade, the FCC has indicated that to promote and preserve competition and move closer toward a level playing field, it was justifiable for ILECs, who were allowed to keep the legacy networks, and not be structurally separated, to be more burdened. Although the ILECs state that the current regime is too burdensome, they have never actually demonstrated the extent of this burden, with the demise, and their recent purchase of their greatest rivals, serving as one token indicator of many. Under the Missoula Plan, CLECs will experience a disproportionate increase in interconnection costs, whereby the incumbent's costs will decrease. Also, Missoula's undoing of the two fundamental principles that have been the underlying basis of interconnection for competitive providers since the enactment of the Telecom Act (i.e., one point of interconnection, and the sharing of facilities costs by

ILECs and CLECs between each providers' switches and the POI)[108] serve to decrease CLEC revenue while maintaining ILEC revenue for the most part.

3. The Missoula Plan's Proposal to Change Network Interconnection Architecture Directly Conflicts with the Telecom Act.

Many of the new rules proposed by the Missoula Plan, especially those relating to network interconnection, run afoul of the regulations mandated by the Telecom Act. In such circumstances, the Commission may only permit the implementation of rules contrary to the regulations of the Act, if it can demonstrate that the standard for regulatory forbearance set forth in the Act is met. To this end, the Act provides:

> The Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that –
> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are *just and reasonable* and are *not unjustly or unreasonably discriminatory*;

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108 Further, such policy shifts cost CLECs while reducing or substantially compromising their ability to recover such costs, depending on each CLEC's customer base.

> (2) enforcement of such regulation or provision is *not necessary for the protection of consumers*; and
> (3) forbearance from applying such provision or regulation is *consistent with the public interest*.[109]

As previously explained in greater detail herein, numerous provisions of the Missoula Plan propose regulation in direct contradiction to the Telecom Act. Moreover, these proposed rules do not differ from the Act in ways that would permit the Commission to meet the forbearance standard in the Act. In fact, if the current interconnection regulations in the Act were forborne, and the Missoula Plan rules put into effect in their place, the result would not be "just and reasonable," and would be "unreasonably discriminatory," and furthermore, such forbearance would leave consumers unprotected, would not be consistent with furthering public interest, and certainly would not "promote competitive market conditions."[110] Application of the Plan rather than the Act will impede competition, increase the amounts paid by consumers for telephone service, and cause major setbacks with regard to network interconnection, effectively reversing all of the progress made over the past decade to build a more competitive consumer-driven environment in the telecom industry.

VI. Conclusion

The Commission does not have the legal authority to implement the changes to intercarrier compensation and interconnection framework

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[109] 47 U.S.C. § 401(a) (*emphasis added*).
[110] 47 U.S.C. § 401(b).

necessary to implement the Missoula Plan. Even if it is determined that such authority does exist, the intercarrier compensation provisions of the Missoula Plan are incomplete and inordinately complex. It is impossible to understand all of its requirements and calculate the precise effects on consumers, providers, and the market. The Missoula Plan's inclusion of the significant interconnection network restructuring proposals have little or no impact in advancing the Commission's goal of simplifying and unifying intercarrier compensation. Furthermore, they completely favor those crafting the Plan, RBOCs and rural ILECs, while the CLECs and CMRS providers are left to bear the costs. The CLECs will experience a disproportionate increase in interconnection costs, while the incumbent's costs will decrease. Consequently, the Plan will lead to endless disputes, litigation, new and revitalized arbitrage opportunities, and uncertainty. Arbitrage opportunities can be better addressed in existing FCC proceedings and by permitting states to have a role. As such, RNK respectfully requests that the Commission reject the Missoula Plan.

Respectfully submitted, by the undersigned,

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